Lembaga Jurutera Malaysia v Leong Pui Kun

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 02–49 OF 2006(W)
ZAKI AZMI PCA, ALAUDDIN CJ(MALAYA) AND NIK HASHIM FCJ
1 AUGUST 2008

Administrative Law — Rules of natural justice — Disciplinary proceedings — Whether rules of natural justice contain any inalienable fundamental right — Whether rules of natural justice variable — Whether rules of natural justice connote adversarial procedures of a court of law

Professions — Engineers — Disciplinary proceedings against — Whether Engineer's Board free to decide on disciplinary procedure — Whether disciplinary proceedings adversarial in nature — Whether powers of board to regulate profession delegable — Whether formal complaint required before board could commence disciplinary proceedings — Whether Registration of Engineers (Amendment) Act 2007 had any retrospective effect

The appellant was established under the Registration of Engineers Act 1967 ('the Act') to, inter alia, determine and regulate the conduct and ethics of the engineering profession. The respondent was an engineer registered under the Act. The respondent was the engineer responsible for the design and construction of a certain bridge which collapsed, killing one person and injuring several others. The appellant, notwithstanding the absence of a formal complaint, launched an investigation into the collapse and brought five charges against the respondent, for inadequate design and insufficient construction supervision of the bridge. After the respondent and counsel were heard on the charges, the appellant ordered the cancellation of the respondent's registration under the Act. The respondent applied to the High Court for orders of certiorari and mandamus to quash the decision of the appellant and to compel it to reinstate him under the Act. The High Court allowed the respondent's application with costs on the grounds that there had been a non-compliance with the Act and there had been breaches of natural justice and procedural fairness. The appellant's appeal to the Court of Appeal was dismissed and the High Court's decision affirmed. The appellant was granted leave to appeal to the Federal Court on the following questions of law: (i) whether the members of the appellant who made the order canceling the respondent's registration under s 15(1) of the Act, had to be the same

members who directly heard the oral evidence; (ii) whether the Act required the appellant to follow the adversarial system of justice; (iii) whether the appellant could act under s 15(1) of the Act without a complaint or complainant; and (iv) whether the disciplinary proceedings against the respondent were tainted or rendered bad in law due to the presence and/or participation of the appellant's secretary and/or its legal adviser at meetings where the respondent's case was discussed. The respondent's counsel contended that recent amendments to the Act, vide the Registration of Engineers (Amendment) Act 2007, answered the questions posed by the appellant and thus rendered its appeal academic.

Held, allowing the appeal with costs:

(1) The Registration of Engineers (Amendment) Act 2007 had no retrospective effect. The amendments only came into force on 1 April 2007 well after the date of hearing on 9 August 1999 and 13 July 2000 when the respondent's registration as a professional engineer was cancelled. The amendments were thus not applicable to the instant case and had to be resolved according to the provisions of the Act prevailing at 9 August 1999 (see para 19).

(2) A purposive construction of s 15 of the Act would indicate that there was no qualification concerning the members who could make a decision under s 15(1) of the Act. The Act vested the power of making an order for cancellation or suspension of the registration of engineers under the said subsection on the appellant as a body corporate as opposed to specific individuals (see para 26).

(3) There were more than two-third of the total number of the appellant members who attended the three occasions on the appellant's case, ie, 14 on the 9 August 1999 oral hearing, 13 on the 11 April 2000 deliberation and 15 on the 13 July 2000 decision. Further, 12 of those who attended the decision date had earlier attended the 9 August 1999 oral hearing. The 12 members who had attended the 9 August 1999 oral hearing were the ones who made the decision to find the respondent guilty of the charges and to cancel his registration as a professional engineer. The 12 members were unanimous in their decision. It was thus clear that there was no violation of the principles of natural justice in any substantial respect because the decision made against the respondent was in fact made by the appellant's members who had heard the evidence on the 9 August 1999 oral hearing (see para 30).

(4) The complaint that one member (Dato' Ir Hj Ahmad Zaidee Laidin) had attended part of the hearing on 9 August 1999 and as such had

forfeited his right to participate in the subsequent deliberation and decision making was erroneous. He was entitled as a member of the appellant to participate in the deliberation and the decision-making. Moreover, as a member of the appellant, he had full access to the tapes and notes of transcript and that was relevant to negate any prejudice to the respondent. More importantly, even without including him, the two-third quorum had been satisfied. The answer to question 1 should therefore be answered in the negative (see paras 31 & 33).

(5) Both the Court of Appeal and the High Court were erroneous in holding that the rules of natural justice or procedural fairness required the hearing under s 15(2) of the Act to be governed by the adversarial system of justice and to follow procedures of criminal court proceedings rather than inquisitorial or investigatory proceedings. Every administrative body is the master of its own procedure and need not assume the trappings of a court. The rules of natural justice do not contain any inalienable fundamental right to the cross-examination of a witness. The rules of natural justice are variable and do not mean adversarial procedures of a court of law or procedures analogous to a court of law (see paras 34 & 36).

(6) The appellant was entitled to conduct the hearing under s 15(2) of the Act in whatever way it deemed appropriate, provided the procedure adopted was not in breach of any specific provision of the Act and did not result in a denial of natural justice to the respondent. In considering whether there was any denial of natural justice, the court had to look at the form and the substance of the hearing conducted by the appellant, but not in a manner as if the proceedings were in a court of law. The substance was more important than form. A procedural breach was insufficient to give an applicant a remedy in court unless there was something of substance that had been lost as a result of the breach. The applicant must have suffered prejudice as a result of the breach of natural justice. In the instant case, the procedure adopted by the appellant substantially complied with the requirements of the rules of natural justice and no prejudice was suffered by the respondent (see para 42).

(7) Disciplinary proceedings under s 15(2) of the Act are not adversarial proceedings. They are inquisitorial or investigative proceedings and not inconsistent with the rules of natural justice. In such proceedings, questions such as the burden of proof, calling of witnesses or the need to explain the procedure would not arise in the same way in which they would in proceedings between parties in a suit. The Act gave the appellant wide powers to regulate the engineering profession, and by virtue of para 2(5) of the Schedule to the Act, those powers could not

be delegated. Thus the allegation of bias on the appellant's part merely because the appellant had acted as accuser, prosecutor and judge was untenable (see para 43).

(8) The Act does not require a complaint or complainant for the appellant to exercise its powers under s 15 of the Act. The appellant may act on its own volition. Any requirement for a complaint would limit the appellant's ability to regulate the engineering profession. In the instant case, the absence of a complaint or complainant did not produce any procedural unfairness or a breach of natural justice (see para 46).

(9) The respondent's argument that question 4 was a question of fact which had been decided by the High Court and upheld by the Court of Appeal, was without substance. The question was a valid question as it involved a principle of importance upon which a decision of the Federal Court would be to public advantage (see paras 53–54).

(10) The High Court judge's findings of bias on the appellant due to the presence and participation of the appellant's secretary at the hearing was unfounded. The respondent's counsel had not only consented to the secretary asking questions, but had further invited the secretary to ask questions. Counsel had also not taken any objection to the secretary's presence and participation in the proceedings. Thus, the respondent had acquiesced to the presence and participation of the secretary in the disciplinary proceedings and had waived any right to object to any irregularity in the proceedings by virtue of the presence or participation of the secretary. The secretary had also not participated in the decision-making of the matter against the respondent. Allegation of bias should be that of the decision-maker and not a person who was not a party or a witness to the proceedings. Since the secretary was not a party or a witness to the proceedings decided by the appellant, the appellant was therefore not guilty of any bias (see para 55).

(11) In respect of the presence and participation of the appellant's legal adviser in the proceedings, there was no breach of natural justice. Further, the respondent had waived any right to object to any advice given by the appellant's legal adviser. The respondent did not object to the legal adviser's presence or role during the oral hearing (see para 62).

[Bahasa Malaysia summary

Perayu ditubuhkan di bawah Akta Pendaftaran Jurutera 1967 ('Akta tersebut') untuk, antara lain, memastikan dan mengawal perlakuan dan etika profesyen kejuruteraan. Responden adalah seorang jurutera yang didaftarkan di bawah Akta tersebut. Responden adalah jurutera yang bertanggungjawab untuk rekaan dan pembinaan sebuah jambatan yang telah runtuh, yang telah

membunuh seseorang dan mencederakan beberapa yang lain. Perayu, tanpa mengambilkira ketiadaan aduan rasmi, telah melancarkan satu penyiasatan terhadap kejadian runtuhan tersebut dan mengemukakan lima pertuduhan terhadap responden, kerana rekaan yang tidak lengkap dan kekurangan kawalan pembinaan jambatan tersebut. Selepas responden dan peguamcara didengar atas pertuduhan tersebut, perayu mengarahkan pembatalan pendaftaran responden di bawah Akta tersebut. Responden memohon kepada Mahkamah Tinggi untuk perintah-perintah certiorari dan mandamus untuk membatalkan keputusan perayu dan untuk memaksanya mengembalikan jawatannya di bawah Akta tersebut. Mahkamah Tinggi membenarkan permohonan responden dengan kos atas alasan ketidakpatuhan terhadap Akta tersebut dan terdapat pelanggaran keadilan asasi dan keadilan prosedur. Rayuan perayu kepada Mahkamah Rayuan ditolak dan keputusan Mahkamah Tinggi disahkan. Perayu diberi kebenaran untuk merayu kepada Mahkamah Persekutuan berdasarkan soalan undang-undang berikut: (i) sama ada ahli-ahli perayu yang membuat arahan pembatalan pendaftaran responden di bawah s 15(1) Akta tersebut, mestilah ahli-ahli sama yang mendengar keterangan lisan secara langsung; (ii) sama ada Akta tersebut memerlukan perayu mengikut sistem keadilan penentangan; (iii) sama ada perayu boleh bertindak di bawah s 15(1) Akta tersebut tanpa satu aduan atau pengadu; dan (iv) sama ada prosiding-prosiding tatatertib terhadap responden telah dicemari atau salah di sisi undang-undang kerana kehadiran dan/atau penglibatan setiausaha perayu dan/atau penasihat undang-undangnya di mesyuarat-mesyuarat di mana kes responden dibincangkan. Peguamcara responden berhujah bahawa pindaan baru kepada Akta tersebut, melalui Akta Pendaftaran Jurutera (Pindaan) 2007, menjawab soalan-soalan yang dikemukakan oleh perayu dan oleh itu menjadikan rayuannya bersifat akademik.

Diputuskan, membenarkan rayuan dengan kos:

(1) Akta Pendaftaran Jurutera (Pindaan) 2007 tidak mempunyai kesan kebelakangan. Pindaan-pindaan tersebut hanya berkuat kuasa pada 1 April 2007 selepas tarikh perbicaraan pada 9 Ogos 1999 dan 13 Julai 2000 apabila pendaftaran responden sebagai jurutera profesional dibatalkan. Oleh itu pindaan-pindaan tersebut tidak digunapakai kepada kes ini dan perlu diselesaikan menurut peruntukan-peruntukan Akta tersebut yang berkuat kuasa pada 9 Ogos 1999 (lihat perenggan 19).

(2) Pembentukan bertujuan s 15 Akta tersebut menunjukkan bahawa tidak terdapat kelayakan berkenaan ahli-ahli yang boleh membuat keputusan di bawah s 15(1) Akta tersebut. Akta tersebut meletakkan kuasa untuk membuat arahan pembatalan atau penggantungan pendaftaran

jurutera-jurutera di bawah subseksyen tersebut ke atas perayu sebagai badan korporat berbanding dengan individu-individu tertentu (lihat perenggan 26).

(3) Terdapat lebih dari dua pertiga daripada jumlah ahli perayu yang menghadiri ketiga-tiga majlis berkenaan kes perayu, iaitu, 14 dalam perbicaraan lisan pada 9 Ogos 1999, 13 dalam persidangan pada 1 April 2000 dan 15 dalam keputusan pada 13 Julai 2000. Selanjutnya, 12 daripada yang hadir pada tarikh keputusan telah sebelumnya hadir dalam perbicaraan lisan pada 9 Ogos 1999. 12 ahli yang hadir dalam perbicaraan lisan pada 9 Ogos 1999 adalah mereka yang membuat keputusan untuk mendapati responden bersalah terhadap pertuduhan-pertuduhan tersebut dan membatalkan pendaftarannya sebagai jurutera profesional. 12 ahli tersebut sebulat suara dalam keputusan mereka. Oleh itu jelas tidak terdapat pelanggaran prinsipal-prinsipal keadilan asasi dalam apa-apa keadaan kerana keputusan yang dibuat terhadap responden adalah sebenarnya dibuat oleh ahli-ahli perayu yang telah mendengar keterangan pada perbicaraan lisan pada 9 Ogos 1999 (lihat perenggan 30).

(4) Aduan bahawa seorang ahli (Dato' Ir Hj Ahmad Zaidee Laidin) telah hadir pada sebahagian perbicaraan pada 9 Ogos 1999 dan oleh itu telah terlucuthaknya untuk turut serta di dalam persidangan dan membuat keputusan selanjutnya adalah salah. Tambahan pula, sebagai ahli perayu, dia mempunyai akses kepada pita-pita dan nota-nota transkrip yang berkenaan untuk menafikan sebarang prasangka terhadap responden. Lebih penting lagi, walaupun tanpanya, korum telah dipenuhi. Jawapan kepada soalan 1 oleh itu sepatutnya dijawab dalam negatif (lihat perenggan 31 & 33).

(5) Kedua-dua Mahkamah Rayuan dan Mahkamah Tinggi telah terkhilaf dalam memutuskan bahawa kaedah-kaedah keadilan asasi atau keadilan prosedur memerlukan perbicaraan di bawah s 15(2) Akta tersebut dikawal oleh sistem keadilan penentangan dan untuk mengikuti prosedur-prosedur dalam prosiding-prosiding mahkamah jenayah. Setiap badan pentadbiran adalah penentu prosedurnya sendiri dan tidak perlu mengikut hal ehwal sesebuah mahkamah. Kaedah-kaedah keadilan asasi tidak mengandungi apa-apa hak asasi asing berhubung pemeriksaan balas seorang saksi. Kaedah-kaedah keadilan asasi adalah berubah-ubah dan tidak bermakna prosedur-prosedur penentangan sesebuah mahkamah undang-undang atau prosedur-prosedur yang seakan-akan sama kepada sesebuah mahkamah undang-undang (lihat perenggan 34 & 36).

(6) Perayu adalah berhak untuk melakukan perbicaraan tersebut di bawah s 15(2) Akta tersebut dalam sebarang cara yang ia rasakan sesuai, dengan syarat prosedur yang digunapakai tidak melanggar mana-mana

peruntukan khusus Akta tersebut dan tidak mengakibatkan penafian keadilan asasi kepada responden. Dalam menentukan sama ada terdapat penafian keadilan asasi, mahkamah perlu melihat kepada bentuk dan asas perbicaraan yang dilakukan oleh perayu, tetapi tidak dalam cara seolah-olah prosiding-prosiding tersebut dilakukan di mahkamah undang-undang. Asas adalah lebih penting daripada bentuk. Pelanggaran prosedur tidak mencukupi untuk memberi remedi kepada perayu di mahkamah kecuali terdapat sesuatu yang kukuh yang telah hilang akibat daripada pelanggaran tersebut. Perayu mesti mengalami prasangka akibat daripada pelanggaran keadilan asasi. Dalam kes ini, prosedur yang telah digunakan oleh perayu telah dipenuhi keperluan-keperluan kaedah-kaedah keadilan asasi dan tiada prasangka dialami oleh responden (lihat perenggan 42).

(7) Prosiding tatatertib di bawah s 15(2) Akta tersebut bukan prosiding-prosiding penentangan. Prosiding tersebut adalah prosiding penyiasatan dan selaras dengan rukun keadilan asasi. Dalam prosiding-prosiding sedemikian, soalan-soalan seperti beban pembuktian, pemanggilan saksi-saksi atau keperluan untuk menjelaskan prosedur tersebut tidak akan berbangkit di dalam cara yang sama dalam mana prosiding-prosiding tersebut akan berbangkit di dalam sesuatu guaman. Akta tersebut memberikan perayu kuasa yang luas untuk mengawal profesyen kejuruteraan, dan dengan mengikut perenggan 2(5) Jadual kepada Akta tersebut, kuasa-kuasa tersebut tidak boleh diwakilkan. Oleh itu tuduhan berat sebelah ke atas perayu hanya kerana perayu telah bertindak sebagai penuduh, pendakwa dan hakim tidak dapat dipertahankan (lihat perenggan 43).

(8) Akta tersebut tidak memerlukan satu aduan atau pengadu untuk perayu melaksanakan kuasa-kuasanya di bawah s 15 Akta tersebut. Perayu boleh bertindak di atas kerelaannya sendiri. Sebarang keperluan untuk satu aduan akan membataskan kebolehan perayu untuk mengawal profesyen kejuruteraan. Di dalam kes ini, ketiadaan sesuatu aduan atau pengadu tidak menghasilkan mana-mana ketidakadilan prosedur atau pelanggaran keadilan asasi (lihat perenggan 46).

(9) Hujahan responden bahawa soalan 4 adalah satu soalan fakta yang telah diputuskan oleh Mahkamah Tinggi dan dikekalkan oleh Mahkamah Rayuan, adalah tanpa asas. Soalan tersebut adalah satu soalan yang sah kerana ia melibatkan satu prinsipal yang penting di mana keputusan Mahkamah Persekutuan akan mendatangkan manfaat kepada umum (lihat perenggan 53–54).

(10) Penemuan-penemuan berat sebelah oleh hakim Mahkamah Tinggi ke atas perayu kerana kehadiran dan penglibatan setiausaha perayu semasa perbicaraan adalah tidak berasas. Peguamcara responden bukan hanya bersetuju kepada setiausaha tersebut bertanyakan soalan, tetapi

telah selanjutnya menjemput setiausaha tersebut untuk menanyakan soalan-soalan. Peguamcara juga tidak menentang kehadiran dan penglibatan setiausaha tersebut di dalam prosiding-prosiding. Maka, responden telah bersetuju dengan kehadiran dan penglibatan setiausaha tersebut di dalam prosiding-prosiding disiplin dan telah mengenepikan mana-mana hak untuk menentang sebarang luar aturan di dalam prosiding-prosiding tersebut oleh sebab kehadiran atau penglibatan setiausaha tersebut. Setiausaha tersebut juga tidak terlibat di dalam urusan membuat keputusan terhadap responden. Pertuduhan berat sebelah patut dibuat oleh pembuat keputusan dan bukan seseorang yang bukan pihak atau saksi kepada prosiding-prosiding. Memandangkan setiausaha bukan pihak atau saksi kepada prosiding-prosiding yang diputuskan oleh perayu, perayu oleh itu tidak bersalah atas sebarang berat sebelah (lihat perenggan 55).

(11) Berkenaan kehadiran dan penglibatan penasihat undang-undang perayu di dalam prosiding-prosiding tersebut, tidak terdapat pelanggaran keadilan asasi. Tambahan pula, responden telah mengenepikan mana-mana hak untuk menentang sebarang nasihat yang diberi oleh penasihat undang-undang perayu. Responden tidak menentang kepada kehadiran atau peranan penasihat undang-undang semasa perbicaraan lisan (lihat perenggan 62).]

Notes

For a case on disciplinary proceedings, see 1 *Mallal's Digest* (4th Ed, 2005 Reissue) para 154.

For cases on engineers generally, see 10 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 1612–1618.

Cases referred to

B Surinder Singh Kanda v The Government of the Federation of Malaysia [1962] MLJ 169, PC (not folld)

Board of Education of the Indian Head School, The v Knight [1990] 1 SCR 653, SC (refd)

Dato' Tan Heng Chew v Tan Kim Hor [2006] 2 MLJ 293; [2006] 1 CLJ 577, FC (refd)

Deputy Chief Police Officer, Perak & Anor v Ramesh a/l Thangaraju [2001] 1 MLJ 161; [2001] 1 CLJ 245, CA (refd)

Fulker v Fulker [1936] 3 All ER 636 (not folld)

Haji Ali bin Haji Othman v Telekom Malaysia Bhd [2003] 3 MLJ 29, CA (refd)

Jones v Welsh Rugby Union (The Times, 6 January 1998 (refd)

Keith Sellar v Lee Kwang Tennakoon v Lee Kwang [1980] 2 MLJ 191, FC (refd)

Leeson v General Council of Medical Education and Registration (1890) Ch D 366, CA (refd)
Lembaga Jurutera Malaysia v Leong Pui Kun [2008] 2 CLJ 466, CA (refd)
Leong Pui Kun v Lembaga Jurutera Malaysia [2002] 4 AMR 4631, HC (refd)
Lim Ko & Anor v Board of Architects [1965] 2 MLJ 203, HC (refd)
Lim Ko & Anor v Board of Architects [1966] 2 MLJ 80, FC (refd)
Mohan Rajadurai v Majlis Perubatan Malaysia [1998] 1 CLJ 903, HC (not folld)
Najar Singh v Government of Malaysia & Anor [1974] 1 MLJ 138, FC (refd)
Pihak Berkuasa Negeri Sabah v Sugumar Balakrishnan [2002] 3 MLJ 72, FC (refd)
R v Birmingham City Justice, ex parte Chris Foreign Foods (Wholesaler) Ltd [1970] 3 All ER 945, HL (refd)
R v Secretary of State for Education and Science, ex parte S [1995] ELR 71, CA (refd)
Tan Hee Lock v Commissioner for Federal Capital & Ors [1973] 1 MLJ 238, FC (refd)
Tanjong Jaga Sdn Bhd v Minister of Labour and Manpower & Anor [1987] 1 MLJ 124, FC (refd)
University of Ceylon v EFW Fernando [1960] 1 WLR 223, PC (refd)

Legislation referred to

Architects Ordinance 1951
Registration of Engineers Act 1967 ss 3, 4(1)(f), 15, 15(1), (2), Schedule para 2(5)
Registration of Engineers (Amendment) Act 2007 ss 14A, 14B, 14C, 24B(2A), Part IIIA
Rules of the High Court 1980 O 53

Appeal from: Civil Appeal No W-02–930 of 2001 (Court of Appeal, Putrajaya)

Rajendran Navaratnam (Chu Ai Li and Eow Ee Pei with him) (Azman Davidson & Co) for the appellant.
Lye Wing Voi (Yap Hsu-Lyn with him) (Lye & Yap) for the respondent.

Nik Hashim FCJ (delivering judgment of the court):

[1] The appellant, the Board of Engineers, Malaysia, a statutory body established pursuant to s 3 of the Registration of Engineers Act 1967 ('the Act') appeals to the Federal Court against the decision of the Court of Appeal given on 17 February 2004, whereby the Court of Appeal dismissed the appellant's appeal with costs against the decision of the High Court which allowed Leong Pui Kun's, the respondent's application for orders of certiorari

A and mandamus to quash the appellant's decision dated 13 July 2000 cancelling the respondent's registration as a professional engineer and to direct the appellant to reinstate the respondent as a professional engineer registered with the appellant respectively.

B FACTUAL BACKGROUND

[2] The facts are that on 16 September 1995 a 32-metre span of partly constructed steel truss linkway bridge at the Matshushita Television Co Sdn Bhd factory in Shah Alam, collapsed whereby one person was killed and five persons were injured (the incident). Soon after the incident, the Director of the Jabatan Kerja Raya Selangor set up a four-member technical sub-committee to investigate into the incident. Dr Judin bin Hj Abdul Karim, *Ketua Kumpulan Kajian Struktur Dan Analisa (Jabatan Kerja Raya*) was one of them. The others were: Dato' Ir Hj Abu Bakar bin Hj Mohd Amin, Director JKR Selangor as *Pengerusi Jawatankuasa Kecil Teknikal*, Dr Gue See Sew and Tuan Hj Yahya bin Hj Ariffin. The findings were set out in the technical sub-committee report ('TSC report') (at pp 866–918 of the appeal record). The findings of TSC report indicates, inter alia, underdesign of the linkway bridge to support the given loads during construction, ineffective lateral restraints and weaknesses in the current system of construction supervision and enforcement as the root causes of the collapse (see p 870 of the appeal record).

[3] The appellant set up a three-member Ad Hoc Committee (Ir Wan Mohamed bin Ismail, Ir Prof Ishak bin Abdul Rahman and Ir Dr Khoo Ping Sen) ('the AHC') with regard to the incident and the role of the registered engineer involved, ie the respondent. The actions taken by the AHC are as detailed in their report and included three meetings, on 26 September 1996, 10 October 1996 and 22 July 1997. The meeting on 10 October 1996 was attended by the respondent in person. The AHC set out its recommendations in a report (the AHC report) (at pp 1040–1108 of the appeal record) to the appellant for the appellant to conduct a hearing under s 15 of the Act. The conclusions and recommendations of the AHC are found at pp 1048–1049 of the appeal record. Before the AHC, the respondent clearly acknowledged the deficiencies in the design of the linkway bridge and supervision of the construction works and the AHC report at pp 1048–1049 states:

3.6 The investigating committee's report had highlighted the deficiency of the design in terms of the effective length, lateral buckling, slenderness of the beam, etc.

3.7 Ir Leong PK explained that the whole project costed about RM35M. The Linkway cost was about 1% of the total cost. The Linkway design was prepared by Abu Bakar Alias, a graduate engineer. Under normal

circumstances, Ir Leong himself will check the design and the design will again be counterchecked by two engineers from Kajima Design Asia. However, in this particular case, somebody must have missed this part of the design and resulted in the collapse. He stated that the overloading is critical and agreed with the comment that if the Linkway was properly designed, the overloading would not affect it and cause the collapse.

4.1 The members noted that the design for the Linkway Bridge was given to a graduate engineer with less than one year design experience. Ir Leong informed that he has been in practice for over ten years and it is unfortunate such a mistake had slipped through. Although he did not prepare the design but as director in charge of the project, he has to sign the plans and take responsibility. The important thing is that the engineer who signs and submits the plans must have checked the plans himself or must have had the plans checked by a competent person.

4.2 The members noted that there were lack of experienced people supervising the works and that the consulting engineer, Ir Leong or his representative did not play a very active role in the construction stage and the supervision of the works.

Refer also to the minutes of meeting on 10 October 1996 wherein the respondent acknowledged the matters mentioned to the AHC (see pp 1068–1072 of the appeal record).

[4] The appellant sent a written notice dated 11 November 1998 to the respondent informing him that he was required to answer to five charges as listed in the appellant's grounds of decision which shall be reproduced later. Charge 1 relates to design. Charges 2–4 relate to checking and supervision of the construction works while charge 5 relates to submission of structural plans before the commencement of works.

[5] The respondent vide his solicitors' letter of 7 December 1998 responded to the charges at pp 852–857 of the appeal record.

[6] Thereafter, upon request by the respondent, a copy of the TSC report was given to the respondent, see p 864 of the appeal record.

[7] The appellant fixed 9 August 1999 as the date of hearing of the five charges against the respondent. At the hearing the respondent was given opportunity to be heard orally and he was represented by counsel. The appellant heard the respondent and his expert and other witnesses and also received written witnesses' statements tendered by the respondent. Please see the notes of proceedings prepared by the respondent's counsel at

pp 959–1032 of the appeal record. From the notes of proceedings it can be seen that the respondent, his witnesses or his counsel had confirmed and admitted to two important facts:

There was inadequate or underdesign of the bridge by the respondent. Please see p 985 of the appeal record

(Note: 'PK' refers to respondent, 'Dr J' refers to Dr Judin, 'V' refers to respondent's counsel, 'C' refers to chairman, 'A' refers to Prof Ang)

PK: Dr Judin, I think you are going to talk upon the ultimate design of 1220 kN and that is why the committee is based on the assumption had ifs and all that, but we are all engineers here ... *And I admit that the buckling length is under-estimated, that leads to the ultimate capacity not enough*. But what is in question to day is the construction stage at the point of time. I think we have to differentiate the 2 different thing very clearly.

Dr J: Your point is assuming that your value of 600 something is correct then failure mode may be different at service, but and *you agree with me the capacity of the member is insufficient for ultimate stage*.

PK: *That's right, if you are talking about ultimate stage, it is right. It is still insufficient*.

Refer to appeal record p 986:

V: Mr chairman, I think we will show. No. *The design was not adequate*, but the design was not the cause of the failure, I think that is a very important point.

Refer to appeal record p 991,

C: Have you taken a look Ir Leong's design?

A: Yes, he had given me the drawings and also the calculations and I have looked at it.

C: So was he calculate OK, was his design correct?

A: *The designer had a bit underestimated the effective length*.

Refer to appeal record p 992:

C: There was no design deficiency?

A: *There is some underdesign*, but not grossly underdesign.

V: And you also mentioned that in your view, this is not a gross underdesign, it is an underdesign, and given the circumstances, right, on the basis of design, it is normally in practice that an engineer who may have underdesign, would go back and correct his mistake and in this situation, would he be able to detect and correct his mistake had the bridge not fallen down?

A: I believe in this case, if the bridge is properly done and at the time that the concrete is poured, there will be some sign, you get a bit more deflection and you can actually go and recheck and then you have a second chance to do the corrective measures, like strengthening the top cord or reduce the effective length by putting more braces. This is possible.

Refer to appeal record p 993:

V: Would you agree now that you have said that, this is not grossly underdesign? It is an under design, but in any event, it would have been possible, as the design, to go and correct whatever deficiencies the design that you provided you are able to see the deficiency in this design. Would that be correct?

A: Yes, I think. At least there is a second chance to look at it and make a check and do strengthening so that you have enough capacity. I think there is a second chance.

V: Dr Judin, I don't know whether you want to ask anything?

Refer to appeal record p 999:

C: Finally you sign the drawings.

PK: I checked and I sign the drawings.

C: You checked!

PK: I checked, but it slipped through, so it is unfortunate. I am sorry.

V: Mr chairman. I think perhaps if I am permitted to do a quick summary on what's actually all about.... As long as we understand the purpose of report and he has made a few statements in respect on the fact that in a design, it can be underdesign but even if underdesign you can still rectify the design. I think it's agreed with Dr Judin that the thing is so instantaneous that it will break immediately without you knowing it …

(ii) *The respondent did not adequately supervise the construction of his design nor take any or adequate steps to ensure the construction was supervised by qualified persons.*

Refer to appeal record p 987:

C: Before we go further, can I ask PK. When you look at the list of supervising staff, did you bother to check whether these people were qualified people? Who is Mr Moey? Is he a local or a Japanese?

PK: He is local.

C: Local? What is his qualification?

PK: I can't tell you now. I think IEM investigation committee interviewed him.

C: *But you never check whether these people were actually qualified or not?*

PK: *Not before the collapse*.

C: *Not before the collapse?*

PK: *Ya, not before the collapse*.

(Emphasis added.)

[8] After the 9 August 1999 hearing the respondent's counsel submitted written submissions and authorities to the appellant for consideration in relation to the five charges.

[9] On 13 July 2000 the appellant then made its decision on the charges against the respondent and exercised its power under the Act to order cancellation of the registration of the respondent as registered engineer and the grounds of decision for the appellant's order are now reproduced as follows:

STATEMENT OF GROUND OF DECISION

Re: Ir Leong Pui Kun

Collapse of the Linkway Bridge

At Matshushita Television Co. Sdn Bhd on 16th September 1995

(1) On 16 September 1995, a 32m span of a partly constructed steel truss linkway bridge at the Matshusita Television Co. Sdn Bhd factory in Shah Alam collapsed, causing the death of one person. The linkway bridge was intended to connect a warehouse, which was under construction, and an existing building. Ir. Leong Pui Kun ('Ir. Leong') was the professional engineer responsible for the engineering aspects of the linkway bridge's design.

(2) On 30 September 1995, a Technical Sub Committee was set up by the Director of the Selangor Public Works Department, Datuk Ir. Abu Bakar Mohd Amin, to (among other things) investigate into the causes of the collapse of the linkway bridge.

(3) The Technical Sub-Committee's findings were set out in a report, which was made available to the Board of Engineers. ('the Board')

(4) The Board's Ad Hoc Committee completed its investigation with regard to the linkway bridge's collapse and submitted its own report together with its recommendation for the Board's consideration. After reviewing the Ad Hoc Committee's recommendation, the Board decided to bring five charges against Ir Leong pursuant to its powers under Section 15 of the Registration of Engineers Act 1967. These charges were as follows:

CHARGE 1

That you, Leong Pui Kun, being the professional engineer with registration No. 4112 who designed or was primarily responsible for the design and construction supervision of the linkway bridge at Matsushita Television Co. Sdn. Bhd., Shah Alam, Selangor Darul Ehsan did between 1994 and 1995 fail to have full regard for the public interest in that you failed to exercise any or adequate care to ensure that the design of the said linkway bridge was in accordance with good engineering practice, thereby contravening Regulation 24 of the Registration of Engineers Regulations 1990, which contravention is punishable under Section 15(1)(g) of the Registration of Engineers Act, 1967.

CHARGE 2

That you, Leong Pui Kun, being the professional engineer with registration No. 4112 who designed or was primarily responsible for the design and construction supervision of the linkway bridge at Matsushita Television Co. Sdn. Bhd. Shah Alam, Selangor Darul Ehsan did between 1994 and 1995 fail to have full and proper regard for the public interest in that you failed to carry out any or adequate periodic inspections of the construction works pertaining to the said linkway bridge to check whether the said works were executed in accordance with good engineering practice, thereby contravening Regulation 24 of the Registration of Engineers Regulations 1990, which contravention is punishable under Section 15(1)(g) of the Registration of Engineers Act, 1967.

CHARGE 3

That you, Leong Pui Kun, being the professional engineer with registration No. 4112 who designed or was primarily responsible for the design and construction supervision of the linkway bridge at Matsushita Television Co. Sdn. Bhd., Shah Alam, Selangor Darul Ehsan did between 1994 and 1995 fail to have full and proper regard for the public interest in that you failed to comply with By-Law 5 of the Selangor Uniform Building By-Laws 1986 by failing to supervise or adequately supervise the erection and/or setting out of the said linkway bridge in your capacity as the qualified person submitting plans, drawings and/or calculations to Majlis Perbandaran Shah Alam, thereby contravening Regulation 24 of the Registration of Engineers Regulations 1990, which contravention is punishable under Section 15(1)(g) of the Registration of Engineers Act, 1967.

CHARGE 4

That you, Leong Pui Kun, being the professional engineer with registration No. 4112, who designed or was primarily responsible for the design and construction supervision of the linkway bridge at Matsushita Television Co. Sdn. Bhd., Shah Alam, Selangor Darul Ehsan did between 1994 and 1995 fail to have full and proper regard for the public interest in that you failed to comply with By-Law 7 of the Selangor Uniform Building By-Laws 1986 by failing to discharge or adequately discharge your responsibility for the proper execution of the construction works relating to the said linkway bridge in your capacity as the qualified person submitting plans, drawings and/or calculations to Majlis Perbandaran Shah Alam, thereby contravening Regulation 24 of the Registration of Engineers Regulations 1990, which contravention is punishable under Section 15(1)(g) of the Registration of Engineers Act, 1967.

CHARGE 5

That you, Leong Pui Kun, being the professional engineer with registration No. 4112 who designed or was primarily responsible for the design and construction supervision of the linkway bridge at Matsushita Television Co. Sdn. Bhd., Shah Alam, Selangor Darul Ehsan did between 1994 and 1995 fail to have full and proper regard for the public interest in that you failed to take any or adequate steps to ensure that the structural plans and calculations for the said linkway bridge had been duly submitted to the Majlis Perbandaran Shah Alam in accordance with By Law 16(1) of the Selangor Uniform Building By-Laws 1986 before commencement of construction of the said linkway bridge, thereby contravening Regulation 24 of the Registration of Engineers Regulations 1990 which contravention is punishable under Section 15(1)(g) of the Registration of Engineers Act, 1967.

(5) The hearing of the above charges by the Board was held on 9th August 1999. Ir. Leong attended the hearing together with his counsel Mr Vincent Lim, co-counsel Mr Kenneth Lai, witnesses Ms Rose Zairani of the Majlis Perbandaran Shah Alam ('MPSA'), Prof. Paul Ang Thien Cheong of the School of Civil & Structural Engineering, Nanyang Technological University and Ir Parminder Singh, a Professional Engineer.

Ir. Leong's counsel's submissions on the fairness of the Board's proceedings and other preliminary matters

(6) Mr. Vincent Lim, learned senior counsel for Ir. Leong, made a number of submissions on the fairness of the proceedings against his client. We deal with each of these submissions below.

(7) Firstly, learned counsel submitted that the Board has acted ultra vires its powers under the Registration of Engineers Act 1967 as it has acted without a complaint being made by MPSA, as stated in the preamble of the Board's letter to Ir Leong dated 11 November 1998.

(8) The Board agrees that no formal complaint against Ir. Leong was made to it by MPSA.

(9) However, the Board is of the view that Section 15 of the Registration of Engineers Act 1967 gives the Board powers to cancel the registration of any engineer in a wide range of circumstances and does not make the exercise of the Board's powers under the Act dependent on the existence of a complaint made by a complainant. The Board is empowered by Section 4(1)(f) of the Act 'to determine and regulate the conduct and ethics of the engineering profession'. This power in *Section 4(1) is very broad and clearly grants the Board the power to regulate the engineering profession even without the existence of a complaint from a complainant.*

(10) In a further submission, Ir. Leong's learned counsel argued that the Board cannot proceed without a complaint as no man can be a judge in his cause.

(11) Learned counsel argued that there are cases that have held that a complainant cannot be a member of a disciplinary body hearing charges against the person who is the subject of the complainant's complaint. These cases are based on common sense rules of fairness that preclude bias and forbid a man from acting as a judge in his own cause.

(12) The Board is of the view that the general principle discussed in those cases does not apply to Ir. Leong's scenario. As mentioned earlier, Sections 4(1)(f) and 15 of the Registration of Engineers Act 1967 give the Board wide powers to regulate the engineering profession. There is nothing in the Act to suggest or indicate that these powers are limited to situations where there is a complaint against a particular engineer. The public interest and the need to properly regulate the engineering profession may require the Board to act against an errant engineer even if no complaint is lodged against him. It would be difficult to surmise that the Board will have no powers to act against an errant engineer simply because the engineer concerned was not the subject of a formal complaint. Such a conclusion would defeat the Board's role of regulating the engineering profession under the Registration of Engineers Act 1967.

(13) Section 15 of the Registration of Engineers Act 1967 makes clear that only the Board can order the cancellation or suspension of an engineer's registration for any breaches of the Act or the regulations made thereunder. No other body is empowered under the Act to cancel or suspend an engineer's registration. This provision makes no exception for the possibility that the Board may be acting to cancel or suspend the registration of an errant engineer on the basis of its own investigations rather than a formal complaint. As such, it must be concluded that Section 15 expressly permits a situation where the Board may bring charges against an errant engineer without a formal complaint and cancel or suspend that engineer's registration, if he is found guilty of any of those charges. Although it may appear that the Board is acting as a 'complainant' and 'judge', such a situation is expressly condoned by the Registration of Engineers Act 1967.

(14) Ir. Leong's learned counsel further argued that the new Section 15A of the Architects Act 1967 does not permit the Board of Architects to act without a complaint.

(15) The Board is of the view that Section 15A of the Architects Act 1967 has no bearing on the interpretation of the existing provisions of the

Registration of Engineers Act 1967. The Board of Architects and the Board of Engineers are different and distinct statutory bodies. The amendment to the Architects Act 1967 to include a new Section 15A does not have a bearing on the powers of the Board of Engineers under Section 15 of the Registration of Engineers Act 1967.

(16) Ir. Leong's learned counsel submitted that the Board has gone beyond the Ad Hoc Committee's recommendations.

(17) The powers in Section 15 of the Registration of Engineers Act 1967 are vested in the Board and not the Ad Hoc Committee. The Ad Hoc Committee may make recommendations to the Board but it is ultimately for the Board to exercise the powers conferred on it by Section 15. The Board is not required to slavishly follow the Ad Hoc Committee's recommendations without studying and agreeing with them. Indeed, if the Board simply adopted the Ad Hoc Committee's recommendation without adequately considering them it will be found to have failed to properly exercise the powers conferred on it by Section 15.

(18) Ir. Leong's learned counsel submitted that the Ad Hoc Committee erroneously stated that the contract for the works had been made between Ir. Leong and Kajima Design Asia. He pointed out at the hearing that his client's contract at all material times was with Kajima (M) Sdn Bhd. He concluded that the Ad Hoc Committee's conclusion was made in reliance on the wrong contract, and further, that no such finding would have been made had the correct contract been referred to.

(19) The Board accepted that Ir. Leong's engagement was with Kajima (M) Sdn Bhd. However, this fact has no bearing on the charges in the present case.

(20) Ir. Leong's learned counsel argued that Ir Leong has been denied the right to procedural fairness.

(21) *The Board does not agree that Ir. Leong's common law and constitutional rights to procedural fairness have been infringed in this case. Ir Leong was given a fair opportunity to be heard and to be represented by counsel at the hearing of the charges against him.*

(Emphasis added.)

Ir. Leong's learned counsel's submission on the various charges brought against Ir. Leong

(22) Ir. Leong's learned counsel submitted that a high standard of proof must be satisfied before the various charges are made out against Ir. Leong.

(23) The Board agreed with this submission. In particular, if the evidence on any point is ambiguous Ir. Leong should be given the benefit of the doubt.

CHARGE 1

(24) Ir. Leong's learned counsel's submitted that the failure of the linkway bridge was not caused by a failure in its design.

CHARGE 2

(25) Ir. Leong called Assoc. Prof Dr Paul Ang Thien Cheong, Associate Professor in the School of Civil and Structural Engineering in the Nanyang Technological University, Singapore, as an expert witness. Prof Ang suggested in his evidence that although Ir. Leong's design was inadequate it was not the cause of the linkway bridge's collapse. According to Prof Ang, the collapse was attributable to other factors such as misalignment of the truss, bad workmanship or improper installation of tie-rods and turn-buckles.

(26) Ir. Leong's learned counsel submitted that because the inadequacies of the design of the linkway bridge were not the cause of its failure, the first charge against Ir. Leong has not been made out. The Board does not agree with his submission. *The first charge against Ir. Leong will be proved if it is shown that Ir. Leong failed to act in the public interest by providing an inadequate design for the linkway bridge and failing to take any steps to rectify the inadequacies in the design. The Board cannot help but conclude that the first charge against Ir.Leong has been proved as*:

(a) *Ir. Leong's own expert agreed that Ir. Leong's design of the engineering aspects of the linkway bridge was inadequate;* and

(b) *Ir. Leong failed to act in the public interest as he failed to take any positive steps to rectify the patently obvious inadequacies in his design*. It is not open to him to argue that because the linkway bridge's collapse was allegedly caused by construction errors, his failure to act in the public interest to ensure the adequacy of his design is a matter of no consequence.

CHARGE 2

(27) Ir. Leong's learned counsel submitted that Ir Leong did not fail to carry out his duty to supervise the works on the linkway bridge.

(28) Although Ir. Leong's contract with Kajima (M) Sdn Bhd does not define the level of supervision of the engineering works on the linkway bridge that Ir. Leong was required to provide, *it cannot be used as a device to cut down his duty to the general public and his duty to act in the public interest*.

(29) The Board is of the view that the Selangor Building By-Laws 1986 ('the Building by-laws') provide guidelines on the standard of supervision required of engineers. By-laws 5 and 7 of the Building by-laws make it clear that:

(a) a qualified person submitting plans is required to be responsible for the proper execution of the work pertaining to those plans. The responsibility for the proper execution of the work concerned will also necessarily involve *the duty to adequately supervise the said work*;

(b) the qualified person is excused from the duty to ensure the proper execution of the work if, with the agreement of the local authority concerned, he appoints another qualified person to carry out this duty in his place. As the duty to ensure the proper execution of the work will of necessity encompass the duty to supervise the said works, it is clear that the qualified person is not excused from his duties of supervision unless another qualified person takes over those duties with the approval of the local authority concerned.

(30) It is clear from the Building by-laws that *Ir. Leong is responsible for supervising the works on the linkway bridge in accordance with plans submitted by him*. He could only excuse himself from this responsibility by appointing, with MPSA's approval, another suitably qualified person to supervise the works in his place. Ir Leong did not seek MPSA's approval to appoint another qualified person to act in his place in the present case in accordance with the Building by-laws. Hence, *the duty defined by the Building by-laws fell squarely on his shoulders*.

(31) Ir. Leong's learned counsel, nevertheless, submitted that Kajima (M) Sdn Bhd was competent to supervise the construction of the linkway bridge in Ir. Leong's place. The Board is unable to agree with this submission for the following reasons:

(a) there is no evidence before the Board to suggest that Kajima (M) Sdn Bhd employed competent staff to supervise the construction of the linkway bridge. The mere fact that the Kajima group has vast engineering expertise is not proof that competent persons were engaged to supervise the construction of the linkway bridge;

(b) there is no evidence before the Board to show that Ir. Leong took any or adequate steps to ensure that Kajima (M) Sdn Bhd employed competent staff to supervise the works in question; and

(c) Ir. Leong took no steps to get MPSA's approval to permit Kajima (M) Sdn Bhd to undertake the obligation to supervise the works imposed on him under the Building by-laws. It is therefore, not open to him to shirk his duty of supervision by claiming that Kajima (M) Sdn Bhd undertook this duty.

(32) *The Board is of the view that the second charge against Ir. Leong has been proved as it is clear that he failed to adequately supervise the construction of the linkway bridge or take any or adequate steps to ensure that the works were properly supervised*. The Board bases this conclusion on the following reasons:

(a) *Ir. Leong was not present at the pouring of the concrete at the time the linkway bridge failed*. This was a critical moment in the bridge's construction. Ir. Leong in his capacity as the engineer who was responsible for the linkway bridge's design and construction supervision under the Building by-laws, ought to have been present to ensure that these works were properly carried out;

(b) *Ir. Leong was not present to supervise the fastening of the linkway bridge's turnbuckles*. This too was a critical moment that required his presence. As Professor Ang pointed out in his evidence, the improper installation of the turnbuckles may have been a possible cause of the linkway bridge's failure.

CHARGES 3 AND 4

(33) Ir. Leong's learned counsel further submitted that the Board should not frame charges against Ir Leong pertaining to the Building by-laws as MPSA has not charged Ir. Leong for breach of the same. The third and fourth charges against Ir. Leong make reference to the Building by-laws.

(34) The Board is of the view that MPSA's failure to prosecute Ir. Leong for breaches of the relevant Building by-laws does not prevent charges being brought by the Board against him for failing to act in the public interest by reason of his failure to comply with the Building by-laws. The Board is not charging Ir. Leong with a breach of building by-laws. The Board is charging him with a failure to act in the public interest as a result of his failure to comply with the relevant Building by-laws.

(35) It has been pointed out in paragraphs 29 and 30 that the duties imposed by by-laws 5 and 7 with regard to the engineering aspects of the linkway bridge's construction fell squarely on Ir. Leong's shoulders. The Board is of the view that Ir. Leong clearly failed to carry out adequate periodic inspections on the construction works involving the linkway bridge in accordance with by-law 5 of the Building by-laws. He failed to be present at the site of the works at critical moments. Two of these critical moments are set out in paragraph 32 above.

(36) Further, Ir. Leong failed to adequately discharge his responsibilities for the proper execution of the construction works pertaining to the linkway bridge in accordance with by-law 7 of the Building by-laws. His failure in this respect can be divided into two parts:

A (a) firstly, *his failure to take any steps to rectify inadequacies in his construction works*; and

(b) secondly, *his failure to adequately supervise the construction of the linkway bridge*.

B (37) Ir. Leong's failure to comply with by-laws 5 and 7 of the Building by-laws amounted to a failure to act in the public interest in breach of Regulation 24 of the Registration of Engineers Regulations 1990. The Board, therefore finds that the third and fourth charges against Ir. Leong have been proved.

C (Emphasis added.)

CHARGE 5

(38) Ir. Leong's learned counsel submitted that Ir. Leong has not breached the Building by-laws as a result of his failure to submit building plans D to MPSA prior to the construction of the linkway bridge.

(39) Learned counsel argued that Section 74 of the Street, Drainage and Building Act 1974 permits a local authority to waive compliance with the Building by-laws. He further argued that MPSA has waived the E requirements in the Building by-laws for the submission of structural plans and calculations prior to the commencement of construction in the present case.

(40) The Board is unable to agree with this submission. Section 74 of the Street, Drainage and Building Act 1974 does not give a local authority F the general right to waive compliance with the Building by-laws. Waiver can only occur if:

(a) a specific application is made to the local authority seeking waiver of a particular by-law. Such application must be supported by G reasons and such plans and other particulars that may be required;

(b) the proposed waiver of the building by-laws must not render the proposed building or structure unsafe.

H (41) There is no evidence in the present case to suggest that the lead consultant engaged in the construction of the linkway bridge or any other person made an application to the MPSA for a waiver of specific Building by-laws in accordance with the requirements of Section 74 of the Street, Drainage and Building Act 1974. Further, there is no evidence to suggest that MPSA gave the consultants engaged on the I project a waiver pursuant to Section 74 of the Street, Drainage and Building Act 1974 from the requirement to comply with the Building by-laws. Indeed, Ms. Rose Zairani, who was employed by MPSA, suggested in her evidence that exemptions from compliance with the Building by-laws were granted to certain projects on the basis of the

State Government's policy. She made no reference to Section 74 as a basis for these exemptions. The Board must, therefore, conclude that any exemption granted by the MPSA to Ir Leong from his obligation to comply with the Building by-laws was not done in accordance with Section 74. As the exemption from compliance with the Building by-laws granted to Ir Leong was not done in accordance with Section 74, the Board can only conclude that this exemption was not granted in accordance with law and was, therefore, unlawful.

(42) However, although MPSA failed to comply with Section 74 when it waived the obligation to submit plans before the commencement of the linkway bridge's construction, the Board is aware of the fact that Ir Leong allowed construction of the linkway bridge to commence before submitting the required plans on the basis of MPSA's waiver. As Ir. Leong acted on the basis of MPSA's waiver, the Board is of the view that he cannot be faulted if that waiver failed to be in accordance with law.

(43) The Board, therefore finds that Ir. Leong's failure to submit plans before the commencement of the linkway bridge's construction in accordance with the Building by-laws was not due to any wrongdoing on his part. As a consequence, the fifth charge against Ir. Leong is dismissed.

Summary of the Board's findings

(44) For the reasons set out above, the Board finds that charges 1 to 4 against Ir. Leong have been proved. Charge 5 against Ir Leong is dismissed.

(45) As Ir. Leong has been found guilty of Charges 1 to 4, the Board hereby orders that his registration as a professional engineer be cancelled with effect from 13th July 2000 in accordance with Section 15(1) of the Registration of Engineers Act 1967.

Verified by

Sgd.

(Dato' Zaini bin Hj Omar)

President

BOARD OF ENGINEERS MALAYSIA

[10] The appellant made its findings with regard to the respondent's design (para 26 of the decision) and supervision of the works (paras 30–35 of the decision) before the appellant found the respondent guilty on the charges 1–4 and pursuant to s 15(1) of the Act, ordered that the respondent's registration as a professional engineer be cancelled with effect from 13 July 2000.

[11] Notice of the cancellation order was given to the respondent by a letter dated 9 October 2000 (see pp 1033–1034 of the appeal record).

[12] It is to be noted that from the evidence, the decision to cancel the registration of the respondent was made on 13 July 2000 and not on 9 October 2000 as found by the learned High Court judge. The appellant however, admitted in its affidavit at p 498 of the appeal record that 11 April 2000 was mistakenly stated as the date of the decision.

[13] On 27 October 2000 the respondent appealed (pp 1038–1039 of the appeal record) against the whole of the decision of the appellant to the Appeal Board as provided under the Act.

PROCEEDINGS IN THE HIGH COURT

[14] Meanwhile the respondent filed an application for judicial review under O 53 of the Rules of the High Court 1980 vide Kuala Lumpur High Court case No R2–25–28 of 2001 seeking an order of certiorari to quash the order of the appellant and an order of mandamus to direct the appellant to reinstate the respondent as a professional engineer under the Act.

[15] On 27 September 2001 the learned High Court judge (Faiza bin Tamby Chik J) allowed the respondent's application with costs on the grounds that there had been a non-compliance with the Act and there had been breaches of natural justice and procedural fairness as well (see *Leong Pui Kun v Lembaga Jurutera Malaysia* [2002] 4 AMR 4631).

PROCEEDINGS IN THE COURT OF APPEAL

[16] Dissatisfied with the decision, the appellant appealed to the Court of Appeal. On 17 February 2004 upon hearing the parties, the Court of Appeal dismissed the appeal with costs and affirmed the decision of the High Court. The grounds of judgment of the Court of Appeal were prepared by Mokhtar Sidin JCA who noted that the grounds were agreed to by Vincent Ng J (later JCA) and while the other member Denis Ong JCA had since retired (see *Lembaga Jurutera Malaysia v Leong Pui Kun* [2008] 2 CLJ 466). In his grounds of judgment, Mokhtar Sidin JCA reproduced substantial extracts from the High Court judgment, and he concluded at pp 535–536 of the report as follows:

> 16. Having gone through the voluminous record of appeal it is clear to me that the learned judge had studied all the evidence produced before him whether by affidavits and documents made available and

he came with a very comprehensive judgment. I have the opportunity of reading that judgment of his, of which the important passages I have cited above and it is clear to me that the learned judge took great pain in producing the judgment. The learned judge supported his decision with the evidence before him. The learned judge had also cited the relevant laws and the authorities to support his judgment.

17. It is clear to me that the learned judge *had committed very limited error if at all*. I could not find any merit in the submissions of the appellant/respondent in defaulting the judgment of the learned judge. Though the learned judge had repeated himself in respect of some of the evidence that appears to be his style of emphasising the point.

18. For the above reasons, we could not find any merit in the appeal, and we dismissed the appeal with costs. The order of the learned judge is hereby affirmed. The deposit, if any, is to the account of taxed costs.

(Emphasis added.)

QUESTIONS OF LAW

[17] On 6 November 2006 this court granted the appellant leave to appeal on the following questions:

(1) whether the board members (the appellant) who make an order under s 15(1) of the Act must comprise of the same board members (the appellant) who have directly heard oral evidence?

(2) whether the Act requires the appellant to follow adversarial system of justice?

(3) whether the appellant can act under s 15(1) of the Act without a complaint or complainant?

(4) was the learned High Court judge correct in concluding that the appellant's decision in the disciplinary proceedings against the respondent were tainted or rendered bad in view of the presence and/or participation of the board's secretary and/or its legal adviser at one or more meetings where the respondent's case was discussed.

PROCEEDINGS IN THE FEDERAL COURT

[18] Before us, learned counsel for the respondent brought to our attention of the recent amendments to the Act, the Registration of Engineers (Amendment) Act 2007, which came into force on 1 April 2007 vide PU(B) 102/2007. The amendment introduced Part IIIA for the establishment of a

disciplinary committee through ss 14A, 14B and 14C. The sections have set out the composition and powers of the Disciplinary Committee and how its proceedings should be carried out. Section 15 as it existed then has been amended to remove all references to the appellant and to substitute the same with that of 'Disciplinary Committee'. Section 24B(2A) prohibits a member of the investigation committee from being a member of the disciplinary committee. Such being the case, learned counsel contends that the amendments have essentially answered all the questions framed by the appellant and therefore the issues raised have been rendered academic and hypothetical.

[19] With respect, I do not agree. The above amendments are not expressed to have retrospective effect. The amendments came into effect on 1 April 2007 well after the date of hearing on 9 August 1999 and 13 July 2000 when the respondent's registration as a professional engineer was cancelled. As such, the amendments are not applicable to the present case (see *Keith Sellar v Lee Kwang Tennakoon v Lee Kwang* [1980] 2 MLJ 191) and the case must therefore be resolved according to the provisions of the Act prevailing as at 9 August 1999.

[20] With regard to the questions, I would answer them in numerical order rather than in the order of questions (2), (4), (3) and (1) as submitted by the appellant.

Question (1)

[21] This question arose from the interpretation of s 15 of the Act when the Court of Appeal affirmed the High Court judgment which held that the two third of the appellant members must be the same persons who attended the hearing (9 August 1999) and the deliberation (11 April 2000) as well as the decision (13 July 2000). Section 15 states:

> (1) Subject to this section the Board may order the suspension or the cancellation of the registration of any Engineer under any of the following circumstances:
>
> (a) ... (f)
>
> (g) if he is found by the Board to have contravened, or failed to comply with this Act or any regulations made thereunder;
>
> (h) ... (o)
>
> (2) The Board shall not make any order under subsection (1) unless —

(a) there has been a hearing at which at least two-thirds of the total number of members of the Board are present; and

(b) an opportunity of being heard either personally or by counsel has been given to the registered Engineer against whom the Board intends to make the order.

[22] It is worthy of note that the quorum of two third of the total number of members of the appellant is 12.

[23] Learned counsel for the appellant submitted that:

(1) The requirement for the two third of the appellant members to be present is limited to the hearing under s 15(2).

(2) There is no requirement for the members of the appellant who make the order under s 15(1) to be the same members who heard under s 15(2).

Learned counsel further submitted that s 15(2) had been complied with by the appellant by the presence of more than two third of the total number of the appellant members during the hearing on 9 August 1999 when the respondent and his witnesses gave their evidence.

[24] In response, learned counsel for the respondent reaffirmed the proposition of law laid down by the learned judge of the High Court that it is contrary to natural justice and procedural fairness for decision makers to be made up of different persons at different times and relied on *Fulker v Fulker* [1936] 3 All ER 636 in support. In that case, the divisional court set aside an order made by justices on the basis, inter alia, that the order could not be upheld because it was based on evidence which had never been heard viva voce by two of the justices. Langton J at p 640 remarked:

> It was most important that all the justices adjudicating upon the evidence on which they were to make their findings should hear that evidence and not have it communicated to them through the medium of justices' clerk's note.

[25] Another authority relied upon by the respondent was *Mohan Rajadurai v Majlis Perubatan Malaysia* [1998] 1 CLJ 903 where Abdul Kadir Sulaiman J (as he then was) at p 914 said:

> that under the circumstances it cannot be said that the decision made by the respondent is correct in law because notwithstanding that the proceedings were recorded on audio tapes for the benefits of those who were not present during certain days of the proceedings they would merely be listening to the recorded

A voices of those who took part throughout but they were precluded from having the opportunity of seeing for themselves the demeanour of each of the witnesses when giving their evidence.

B **[26]** There is much merit in the appellant's submission. A purposive construction of s 15 of the Act indicates that there is no qualification for the members who can decide under s 15(1). The Act vests the power of making an order for cancellation or suspension of registration of engineers under the subsection on the appellant as a body corporate as opposed to specific C individuals.

[27] In *Lim Ko & Anor v Board of Architects* [1966] 2 MLJ 80 the appellants Lim Ko and Wong Chee Leong had been found guilty of unprofessional conduct in that: (a) Lim Ko had signed for the purposes of submitting for D approval drawings made or under the supervision of Wong Chee Leong; and (b) Wong Chee Leong had been a party to securing the signature of Lim Ko on the plans and had shared fees with him. An appeal to the High Court was dismissed (*Lim Ko & Anor v Board of Architects* [1965] 2 MLJ 203) and the appellants appealed to the Federal Court. On appeal it was argued, inter alia, E that there were irregularities in the composition of the committee of inquiry which heard the complaint in this case in that they were differently constituted for the hearings and the chairman did not preside over the meeting. In dismissing the appeal Barakbah CJ (Malaya) (as he then was) remarked:

F

> It is a cardinal fact to remember that the board of architects is a domestic tribunal, whose proceedings are not subject to the same degree of close scrutiny for irregularities which, in the ordinary courts of law, may suffice to prove fatal to the validity of its decision. … what is more important is not the form but the G substance

Ong Hock Thye FJ in his separate judgment at p 94 said:

> ... It was argued that the so-called committee was differently constituted on the two occasions it met, that is to say, Mr Eric Taylor on 24 August replaced an absentee H member of the original body of five which sat on 6 July. I do not think that there is any substance in this argument so long as this domestic tribunal in the conduct of its proceedings had not violated any principle of natural justice. I would repeat what had been said earlier, that t*he proceedings of domestic tribunals conducting an inquiry are by no means bound by the strict rules which apply to criminal trials*. In this I connection I would quote from the judgment of Tucker LJ in *Russell v Duke of Norfolk*:
>
> > Counsel for the plaintiff, in the course of his forceful argument on this point, again and again said: 'What would be said of local justices who acted in this way?' With all due respect, the position is totally different. This matter is not to

be judged by the standards applicable to local justices. Domestic tribunals of this kind are entitled to act in a way which would not be permissible on the part of local justices sitting as a court of law.

(Emphasis added.)

[28] The case of *Lim Ko* was brought to the attention of the High Court and the Court of Appeal must have seen it in the judgment of the High Court. But unfortunately, the learned High Court judge had erroneously held that the Federal Court decision had no binding effect on him (see pp 318–322 of the appeal record). It is true that *Lim Ko* dealt with the disciplinary proceedings involving the profession of architects under the Architects Ordinance 1951 but it affirmed the principle that the proceedings of statutory tribunals conducting an inquiry are by no means bound by the strict rules which apply to criminal trials.

[29] In addition to the above principle, the Federal Court in *Lim Ko* also regarded as relevant the fact that minutes of the board of inquiry had been circulated to all board members. (see p 94 of the report).

[30] In the present case, more than two third of the total number of appellant members attended the three occasions: 14 on 9 August 1999 hearing, 13 on 11 April 2000 deliberation and 15 on 13 July 2000 decision. And a substantial number, ie 12 of those who attended on the decision date had earlier attended during the oral hearing. The 12 appellant members who had attended the oral hearing on 9 August 1999 were the ones who made the decisions to find the respondent guilty of the four charges and to cancel his registration as a professional engineer. The 12 members were unanimous in their decisions (see pp 498–499 and 533 of the appeal record). It is thus clear that there was no violation of the principles of natural justice in this case in any substantial respect because the decisions against the respondent were in fact made by the appellant members who heard the evidence on 9 August 1999. Therefore, the appellant is right in its submission that the learned High Court judge misdirected himself in that he failed to give his proper consideration to these undisputed facts.

[31] The complaint that Dato' Ir Hj Ahmad Zaidee Laidin had attended part of the hearing on 9 August 1999 and as such he had forfeited his right to participate in the subsequent deliberation and decision-making, is erroneous as Dato' Ir Hj Ahmad Zaidee Laidin was entitled as a member of the appellant to participate in the deliberation and the decision-making. Moreover, he, as a appellant member, had full access to the tapes and notes

of transcript and surely this was relevant to negate any prejudice to the respondent. More importantly, even without including him, the two third quorum had been satisfied.

[32] With regard to the cases of *Fulker* and *Mohan Rajadurai* cited earlier by the respondent, I do not think they are quite applicable. The legal proposition in the former only applies to the courts of law. It does not apply to statutory tribunals, such as in our case here. Whereas in *Mohan Rajadurai*, the legal proposition quoted above is contrary to the legal principles established by the Federal Court in *Lim Ko*, and as such, it should not be followed.

[33] My answer to question (1) is therefore in the negative.

Question (2)

[34] On question (2), the appellant is right that both the Court of Appeal and the High Court were erroneous in holding that the rules of natural justice or procedural fairness required the hearing under s 15(2) of the Act to be governed by the adversarial system of justice and follow procedure with features of criminal court proceedings and not by an inquisitorial or investigatory proceedings. These are some of the legal propositions which the High Court judge erroneously made in his judgment:

At p 112 of the appeal record:

> I am of the opinion that *the disciplinary action is governed by the adversarial system of justice* and that the principles of natural justice and procedural fairness are to equally apply.

At p 109 of the appeal record:

> The applicant (the respondent) had very clearly in para 15 encl 5 of the applicant's affidavit stated that in *the case of disciplinary hearing under the Malaysian System of Justice the process is an adversarial and not an inquisitorial and that the board had conducted the hearing in an inquisitorial manner*. I am of the opinion *the concept 'the Board's function at disciplinary hearing is investigatory in nature'* and that 'it is not adversarial or inquisitorial' is *totally anathema in Malaysian legal jurisprudence and it smacks of powers given only in a police state*.

At pp 123–124 of the appeal record:

> *It is fundamental that wrong is not presumed*. The Latin maxim *injuria non praesumitur*sets out the point that just as in criminal matters guilt is never presumed, so in civil cases no one is presumed to have done a wrong or injurious act. *It must be proved by him who complains of it*. I think *the respondent's (the appellant's) submission that it need not adduce any evidence at the hearing as there was no requirement for any form of procedure to be followed, runs contrary to this maxim*.

… the respondent (the appellant) did not at any time give any explanation on the burden of proof, the standard of proof, and as to who was to bear the burden.

… it was *wrong for the respondent (the appellant) to state that the 'report and the charges stand by themselves' as for a charge to be established the Board must adduce evidence to prove the charge. The failure to do so will mean that the charges had not been proven beyond reasonable doubt*, ie the board has not got any benefit of presumption in law.

At p 129 of the appeal record:

... the respondent (the appellant) had not proffered any evidence in support of the charges.

[35] Further, the learned judge also held that the respondent had an inalienable fundamental right to cross-examine the complainant which he read into s 15(2) of the Act as the meaning of opportunity to be heard when he said at p 117 of the appeal record:

Section 15(2)(b) clearly spells out that an opportunity to be heard must be given to the registered engineer against whom the Board intends to make the order. I am of the opinion that the *opportunity to be heard would mean that the (engineer) had an inalienable fundamental right to question the person who has complained against him as a professional* ...

[36] The above legal propositions of the learned judge are flawed. They are in direct contrast with a long line of established Supreme Court, Federal Court and Court of Appeal authorities that hold that every administrative body is the master of its own procedure and need not assume the trappings of a court. The rules of natural justice do not contain any inalienable fundamental right to cross-examination of a witness, including the complainant (see *Disciplinary Tribunals* by JRS Forbes, 1990, at pp 115–121; *University of Ceylon v EFW Fernando* [1960] 1 WLR 235 (PC)). The rules of natural justice are variable and do not mean adversarial procedures of a court of law or analogous to a court of law.

[37] In *Lim Ko*, Pike CJ (Borneo) said at p 85:

Clearly the form and the substance of the enquiry must be looked at closely to see whether in any substantial respect there could be said to be a denial of natural justice. But it must not be looked at as would the proceedings of a court and cases which relate to the standards expected of courts of justice are not in my opinion in point in consideration the nature of an enquiry into a disciplinary breach by a member of a professional body by fellow members.

A At p 87 he continued:

> In considering the proceedings of a domestic tribunal of this sort *a legalistic approach is not appropriate* …

B At p 94 Ong Hock Thye FJ said:

> I would repeat what had been said earlier, that the proceedings of domestic tribunals conducting an inquiry are by no means bound by the strict rules which apply to criminal trials.

C **[38]** In *Tan Hee Lock v Commissioner for Federal Capital & Ors* [1973] 1 MLJ 238, Gill FJ (as he then was) delivering the judgment of the then Federal Court said at p 240:

D > It is clear from the authorities that natural justice does not mean that a person performing an administrative or ministerial act must follow the procedure of a court of law or adopt procedure analogous to that of a court of law.

[39] In the Federal Court case of *Tanjong Jaga Sdn Bhd v Minister of Labour* E *and Manpower & Anor* [1987] 1 MLJ 124, Abdoolcader SCJ said at p 127:

> On the matter of natural justice and the right to a hearing, the fundamental proposition about the content of the *audi alteram partem* rule has been stated time and again: it is variable. *The rules are not inflexible principles* and may vary in their content in the circumstances of the case and in their ambit in the context of their F application.

[40] In the Court of Appeal case of *Haji Ali bin Haji Othman v Telekom Malaysia Bhd* [2003] 3 MLJ 29, Gopal Sri Ram JCA adopted the view G expressed by L' Heureux-Duke J in the Supreme Court of Canada in *The Board of Education of the Indian Head School v Knight* [1990] 1 SCR 653:

> It must not be forgotten that *every administrative body is the master of its own procedure and need not assume the trappings of a court*. The object is not to import H into administrative proceedings the rigidity of all the requirements of natural justice that must be observed by a court, but rather to allow administrative bodies to work out a system that is flexible, adopted to their needs and fair.
>
> (Emphasis added.)

I **[41]** In addition to the above, our courts have not laid down any principle that the rules of natural justice or procedural fairness contain any inalienable fundamental right. The Federal Court in *Pihak Berkuasa Negeri Sabah v Sugumar Balakrishnan* [2002] 3 MLJ 72 has resisted the elevation of natural justice or procedural fairness to constitutional rights that cannot be excluded.

[42] Indeed, I agree with the appellant that the judicial resistance against the imposition of formal court procedure or adversarial procedure was applied by the Federal Court in *Lim Ko* in the context of hearings of a disciplinary nature where the governing statute in that case, the Architects Ordinance 1951, was silent as to the procedure to be adopted and gave the board of architects a general discretion to regulate its own procedure, as in our case. Thus following the authority of *Lim Ko*, the appellant is entitled to conduct the hearing required under s 15(2) of the Act in whatever way it deems appropriate provided that the method of proceedings it adopts is not in breach of any specific provision of the Act and does not result in a denial of natural justice to the engineer involved. In considering whether there is any denial of natural justice, the court is to look at the form and the substance of the hearing conducted by the appellant closely to see whether in any substantial respect there could be said to be a denial of natural justice, but the appellant's proceedings must not be looked at as would the proceedings of a court of law. What is more important is not the form but the substance. The procedural breach is insufficient to give an applicant a remedy in the court unless there is something of substance that had been lost resulting from the breach. The applicant must have suffered prejudice as a result of the breach of natural justice (see *Tanjong Jaga*). Therefore, the mode of procedure adopted by the appellant in the exercise of the general discretion given to the appellant under para 2(5) of the schedule to the Act ('... the Board shall determine its own procedure ...') substantially complied with the requirements of the rules of natural justice and hence no prejudice suffered in the circumstances of the present case.

[43] It is thus clear from the foregoing authorities that the disciplinary proceedings under s 15(2) of the Act are not adversarial proceedings. They are inquisitorial or investigatory proceedings and they are not inconsistent with the rules of natural justice (see *Jones v Welsh Rugby Union (The Times, 6 January* 1998)). In such proceedings, questions such as burden of proof, calling of witnesses or the need to explain the procedure do not arise in the same way in which they would in proceedings between parties in a suit, for such proceedings do not involve two opposing parties or adversaries before an independent adjudicator. In the instant case, the Act gave the appellant wide powers to regulate the engineering profession, and in doing so, to play an active role in initiating, prosecuting and making a decision in disciplinary proceedings and by virtue of para 2(5) of the Schedule to the Act these powers cannot be delegated. Therefore, the allegation of bias on the appellant's part just because the appellant had acted as accuser and prosecutor and judge is untenable.

[44] Thus, my answer to question (2) is in the negative.

Question (3)

[45] The Court of Appeal affirmed the High Court judgment which

decided that the appellant had acted beyond its permissible lawful limits by deciding that it was empowered under s 15 of the Act to make a decision or order against the respondent without producing a complainant at the hearing on 9 August 1999.

[46] Clearly, the Act does not expressly require a complaint or complainant for the appellant to exercise its powers under s 15 of the Act and that the appellant may act on its own volition without the need for a formal complaint to be lodged or a complainant to prosecute an errant engineer. Any requirement on complaint would limit the appellant's ability to regulate the engineering profession as stated in s 4(1)(f) of the Act.

[47] In *Lim Ko* the Federal Court had clearly recognised that the board of architects was not required to disclose any complaint or complainant to the architect concerned, nor was it required to produce the complainant at the hearing. Pike CJ (Borneo) said at p 86:

> With regard to the non-disclosure of the names of architects who had complained or made a report to the board I am of opinion that the board were entitled to refuse to make such a disclosure … It is to be expected that such a board will receive reports from its members and if those reports may not be, and are not, regarded as confidential it is certain that the board would no longer receive them … The board is a domestic body concerned with domestic affairs of the architect's profession and it has a right to have regard to the interests of the profession as a whole in deciding whether or not information received by it and the source of that information should be disclosed to one of its members.

[48] Quite apart from *Lim Ko*, the English courts have also recognised that a disciplinary proceedings may be undertaken without any complaint in the normal sense of the word, for example following publication of a press report coming to the attention of the regulator (see *Disciplinary and Regulatory Proceedings* (3rd Ed) Brian Harris QC at p 101) or the regulator could proceed *mero motu* (*Leeson v General Council of Medical Education and Registration* (1890) Ch D 366 (CA)).

[49] In any event, there was already indirectly a complaint or factual basis for the appellant to initiate action against the respondent in the findings of the TSC and AHC reports. The respondent was given copies of the said reports and had knowledge of what was complained or alleged against him, and was given the opportunity to contradict the same. Besides, the respondent had the benefit of a full hearing on 9 August 1999 at which he was represented by two counsel. On the facts, no prejudice in substance had been caused to the respondent by the absence of a complaint or complainant. Such absence did not produce any procedural unfairness or a breach of natural justice as the respondent was given the opportunity to contradict it at

the hearing (see *Deputy Chief Police Officer, Perak & Anor v Ramesh a/l Thangaraju* [2001] 1 MLJ 161; [2001] 1 CLJ 245 held 2).

[50] In this case, it is clear from the facts that the decision of the appellant would not have been different had there been a complaint or complainant. This is because the appellant's decision was based on the respondent's admissions and findings on the two important matters, ie underdesign and lack of supervision.

[51] Therefore, the answer to question (3) is in the affirmative.

Question (4)

[52] This question arose as a result of the findings of the learned High Court judge who held that:

(1) there was a breach of natural justice or it was totally repugnant to natural justice and there was real likelihood of bias or actual bias on the part of the appellant for the appellant's secretary Ir Judin bin Abdul Karim to be present and or participate at the oral hearing or meetings where the respondent's case was discussed or decided; and

(2) there was a breach of natural justice in relation to the legal advice rendered by the appellant's legal adviser which was allegedly not disclosed to the respondent.

The Court of Appeal affirmed the findings.

[53] Before us, the respondent argued that the question was in fact a question of fact which was decided by the High Court and upheld by the Court of Appeal and this finding ought not to be disturbed. The learned High Court judge was therefore right in his finding that there was indeed a real likelihood of bias in light of the actions and participation of the appellant's secretary and the legal adviser at the deliberation and at the hearing. That was what had tainted the decision of the appellant, not so much their mere presence and cited *R v Birmingham City Justice, ex parte Chris Foreign Foods (Wholesaler) Ltd* [1970] 3 All ER 945 and *B Surinder Singh Kanda v Government of the Federation of Malaysia* [1962] MLJ 169 in support.

[54] I can find no substance in the respondent's argument. The framed question is a valid question as it involves a principle of importance upon which a decision of the Federal Court would be to public advantage.

THE PRESENCE OF THE SECRETARY

[55] With regard to the learned judge's findings of bias on the appellant by the presence and participation of the secretary at the hearing, the learned judge was clearly in error when he failed to take into account the material fact that the respondent not only consented to the appellant's secretary, Ir Dr Judin bin Abdul Karim, asking questions (at p 988 of the appeal record), the respondent's counsel himself invited the secretary to ask questions ('V (counsel): Dr Judin, I don't know whether you want to ask anything?' at p 993 of the appeal record). The respondent and his counsel did not at any time take any objection whatsoever to the presence or participation of the secretary or to the line of questioning or the comments made by him. Thus, the respondent by his or his counsel's conduct and their failure to object consented or acquiesced to the presence and participation of the secretary in the disciplinary proceedings. The respondent had therefore waived any right to object to any irregularity in the proceedings by virtue of the presence or participation of the secretary (see *Najar Singh v Government of Malaysia & Anor* [1974] 1 MLJ 138 (FC) at p 141; *University of Ceylon v EFW Fernando* at p 235).

[56] In the present case, the proceedings that took place before the appellant was not repugnant to natural justice. Neither was there a real danger of bias (being the correct test — as opposed to real likelihood of bias or actual bias as held by the learned High Court judge, see *Dato' Tan Heng Chew v Tan Kim Hor* [2006] 2 MLJ 293; [2006] 1 CLJ 577 (FC) had taken place. The questions put by the secretary and answers given by the respondent's expert witness, Prof Ang, must be appreciated in the context of the respondent's admission to underdesign and the lack of his proper supervision of the construction works on site.

[57] It is noted that the English case of *Birmingham City* cited by the respondent was wrongly applied by the learned judge. In that case, the justice (the decision-maker) retired together with the chief veterinary officer, the person who was pursuing the case against the applicants, and a public analyst, a person who gave evidence, with the expressed intention of taking advice from them. It was held that the retirement of the justice in the company of two officials in order to take advice and the return of all three persons just prior to his decision amounted to a breach of natural justice since he did not inform the applicants of the advice tendered and give them an opportunity to counter it.

[58] In *Tan Hee Lock* the Federal Court limited the application of the case of *Birmingham City* to a situation where the decision-maker consulted a party to the proceedings or a witness. In our case, the secretary was not a party to

the proceedings or a witness as was the case in *Birmingham City*. The secretary queried the respondent's witness, Prof Ang in the open proceedings and in the presence of the respondent and his counsel on 9 August 1999. Further, the secretary only attended the meetings on 11 April 2000 and 13 July 2000 as the secretary, an ex-officio member of the appellant. He did not participate in the decision-making of the matter against the respondent. In any event, anything that the secretary might have said to the appellant would not have been material and would not have caused the respondent any prejudice because the respondent had made the two incriminating admissions of facts. Be that as it may, the allegation of bias should be that of the decision-maker and not a person who was not a party or a witness to the proceedings. Since the secretary was not a party or a witness to the proceedings decided by the appellant, the appellant was therefore not guilty of any bias.

THE PRESENCE OF THE LEGAL ADVISER

[59] With regard to the presence and participation of the legal adviser, Mr Yatiswara Ramachandran, in the appellant's proceedings, the learned High Court judge erred in law and in fact in concluding that there was a breach of natural justice in relation to the legal advice rendered by him to the appellant which was allegedly not disclosed to the respondent.

[60] Clearly, in this case, there was no breach of natural justice for the appellant to confer with its legal adviser (*Tan Hee Lock*). However, there was one legal advice given to the appellant that related to the existence of a complaint which was raised by the respondent in its written submission. But this advice was disclosed in the appellant's letter dated 12 May 2000 (at p 1109 of the appeal record) when the appellant stated:

> ... The existence of a complaint from the MPSA is not relevant to the validity of the charges against Ir Leong. The Board has the powers under, inter alia, sections 4(1)(f) and 15 of the Registration of Engineers Act 1967 to carry out investigations into the professional conduct of engineers to ensure compliance with the Registration of Engineers Act 1967 and the regulation thereunder even in the absence of complaints.

Thus, on the facts, the respondent had not been prejudiced because the respondent was in fact given the opportunity to present further written submissions on the preliminary issue relating to complaint after the appellant had heard advice from its legal adviser on the matter, and the appellant considered the further submission of the respondent before making a decision. Apart from that advice, there was no other legal advice on new point that had been considered that need to be disclosed by the appellant to the respondent (see *R v Secretary of State for Education and Science, ex parte S* [1995] ELR 71 (CA)).

[61] The case of *B Surinder Singh Kanda* referred to by the respondent is not quite relevant to our case. In that case, the report that had not been disclosed to the appellant in that case contained evidence and findings of facts that constituted the heart of the charges against the appellant. Whereas in our case, the material that is subject of the alleged non-disclosure is legal advice that related to a submission of law that had been raised by the respondent in written submission, and not evidence or findings on facts.

[62] In any event, the respondent had waived any right to object to any advice given by the appellant's legal adviser. The respondent did not object to the legal adviser's presence or role during the oral hearing. In fact, the respondent's counsel was fully aware and even acknowledged that the appellant may take advice from the legal adviser (at p 1002 of the appeal record).

[63] Thus, for the above reasons, the learned High Court judge was erroneous in concluding that the appellant's decision against the respondent were tainted or rendered bad in law by virtue of the presence and or participation of the appellant's secretary and legal adviser in the proceedings.

[64] Therefore, my answer to question (4) is in the negative.

CONCLUSION

[65] All the four questions of law have been answered at the end of each question in numerical order. Accordingly, I allow the appeal with costs. The orders of the High Court and the Court of Appeal are hereby set aside. The order of the appellant, made on 13 July 2000, is upheld. The deposit shall be refunded to the appellant.

[66] The learned President of the Court of Appeal (now Chief Justice) and the learned CJ (Malaya) have read this judgment in draft and have expressed their agreement with it.

Appeal allowed with costs. High Court and Court of Appeal orders set aside.

Reported by Andrew Christopher Simon